Filed 8/15/17 In re T.M. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re T.M., a Person Coming Under the Juvenile Court Law.	H043964 (Santa Clara County Super. Ct. No. 314-JV41005)
THE PEOPLE, Plaintiff and Respondent, v. T.M., Defendant and Appellant.	

T.M., a ward of the juvenile court, appeals following his admission to the crimes of carjacking (Pen. Code, § 215), receiving a stolen vehicle (*id.*, § 496d), and possession of a dirk or dagger (*id.*, § 21310). T.M. asserts that the court erred in imposing a probation condition that required him to turn over passwords to his social media accounts, because the condition is unreasonable and unconstitutionally overbroad.

STATEMENT OF THE FACTS AND CASE

On December 16, 2014, the victim was sitting in her car that was parked in the Valley Fair Mall parking lot. T.M. and his friend walked up to the victim's car, opened the car door, and pointed a handgun in her face. They ordered the victim to get out of her car. She complied, and the boys got into the car. T.M. drove the car and fled the scene with his friend.

T.M. was arrested two days later and gave officers permission to search through his cell phone. They found several digital photographs of T.M. holding guns.

On December 22, 2014, a juvenile wardship petition was filed pursuant to Welfare and Institutions Code section 602, alleging that T.M. committed carjacking (Pen. Code, § 215), and second-degree robbery (*id*., §§ 211, 212.5, subd. (c)). On February 26, 2015, T.M. admitted that he committed carjacking, and the robbery allegation was dismissed. On March 11, 2015, the court adjudged T.M. a ward of the court, and ordered him to spend six to eight months at the Juvenile Rehabilitation Facilities' Enhanced Ranch Program and placed him under the supervision of the juvenile probation department.

After spending approximately eight months confined in a juvenile institution, T.M. was released to the care of his grandparents on December 4, 2015 and placed in a juvenile pre-release program. T.M. did not perform well on probation. On April 14, 2016, T.M.'s probation officer searched through his phone and found a photograph of him posing with a handgun tucked into his belt. On June 9, 2016, T.M. was caught driving a stolen vehicle with a friend. Upon his arrest, T.M. possessed a three-inch dagger and stolen jewelry.

On June 13, 2016, while T.M. was still on probation, a second juvenile petition was filed, alleging that T.M. was in receipt of a stolen vehicle (Pen. Code, § 496d), and possessed a dirk or dagger (*id*., § 21310). T.M. admitted the allegations.

On July 5, 2016, the court continued his wardship, and ordered him to receive wraparound services with permission to move in with his older sister. After amending the probation department's recommended conditions, the court imposed the following as condition No. 12: "The minor must supply all passwords to any social media website such as Mocospace, Facebook, Snapchat, Tinder, Twitter, or any other social media site

in which the minor may receive, send or store photos or text messages relating to firearms."[1]

T.M. filed a timely notice of appeal challenging the probation condition.

DISCUSSION

T.M. argues that the social media search condition in this case is unreasonable because it is not related to his offenses, prohibits conduct that is not itself criminal, and is not related to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) In addition, T.M. asserts that the condition is unconstitutionally overbroad because it unlawfully infringes on his right to privacy.

Reasonableness

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety . . . ." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) This broad discretion, however, "is not without limits." (*Id.* at p. 1121.) A condition of probation is generally "invalid [if] it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Lent, supra,* 15 Cal.3d at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) We review the imposition of probation conditions for abuse of discretion. (*Ibid.*)

There is no dispute that the second prong of the *Lent* test is satisfied here, because "it is beyond dispute that the use of electronic devices and of social media is not itself criminal." (*In re J.B.* (2015) 242 Cal.App.4th 749, 755 (*J.B.*).)

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[1] The court also imposed condition No. 11 related to passwords for all of T.M.'s electronic devices. While T.M. purports to challenge this condition No. 11 in the argument heading of his opening brief, the actual substance of the argument relates to the social media search stated in condition No. 12.

With regard to the first *Lent* factor, we disagree with the People that T.M.'s crimes were related to the use of social media. The People argue that the nature of T.M.'s crimes indicate that it was "likely that he communicated with his co-participant and arranged to be picked up in the stolen vehicle by means of social media accounts," and that such accounts are "a potential instrumentality of the offense." We find the People's argument to be based entirely on speculation. There is nothing in this case showing that T.M.'s crimes were connected to his use of social media. We find that the first factor in *Lent*, that the condition have " 'no relationship to the crime of which the offender was convicted,' " is met in this case. (*Lent, supra,* 15 Cal.3d at p. 486.)

The issue remains as to whether the third prong of the *Lent* test is met. T.M. argues that there is nothing in the record that connects his crime of carjacking, possession of a stolen car and dirk or dagger to his use of electronic devices or social media. Reasonableness under the third prong of the *Lent* test exists when a probation condition "enables a probation officer to supervise his or her charges effectively . . ." (*Olguin, supra,* 45 Cal.4th at pp. 380-381), even if the condition "has no relationship to the crime of which a defendant was convicted." (*Id.* at p. 380.)

T.M. argues that we should follow the rationale of two recent juvenile cases that have reviewed probation conditions similar to the electronic search conditions here. T.M. cites *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*) and *J.B., supra,* 242 Cal.App.4th 749. These cases declined to read *Olguin* as sanctioning imposition of electronic search conditions without evidence the probationer is likely to use his or her electronic devices or social media for proscribed activities. Because there was no evidence in the record connecting the minor's conviction for drug possession with her use of electronic devices, the court in *Erica R.*, rejected the juvenile court's justification that " 'many juveniles, many minors, who are involved in drugs tend to post information about themselves and drug usage.' " (*Erica R., supra,* at p. 913.) The court explained that " '[n]ot every probation condition bearing a remote, attenuated, tangential, or

diaphanous connection to future criminal conduct can be considered reasonable.' " (*Ibid.*) Similarly in *J.B.*, the court rejected the juvenile court's imposition of electronic search conditions on a minor convicted of petty theft who also had admitted to using marijuana: "[T]here is no showing of any connection between the minor's use of electronic devices and his past or potential future criminal activity. As in *Erica R.*, ' "there is no reason to believe the current restriction will serve the rehabilitative function of precluding [J.B.] from any future criminal acts." ' " (*J.B., supra*, at p. 756.)[2]

We find that *J.B.* and *Erica R.* are distinguishable from the present case. In those cases, there was no evidence that the minors used electronic devices or social media to record, demonstrate or promote their criminal activity. Here, in contrast, T.M. had numerous pictures on his phone showing him possessing a firearm. Such photos could easily be used to promote T.M.'s crimes on social media.

Moreover, both *J.B.* and *Erica R.* stand in contrast with *In re P.O.* (2016) 246 Cal.App.4th 288, 296 in which the appellate court upheld a comparable condition under *Lent* despite no direct evidence that the minor was inclined to use electronic devices or social media. The minor in *P.O.* admitted to a misdemeanor count of public intoxication. The juvenile court imposed an electronic search condition, reasoning that " 'we have people who present themselves on the Internet using drugs or . . . in possession of paraphernalia, and that's the only way we can properly supervise these conditions.' " (*Id.* at p. 293.) The court affirmed the juvenile court's finding that the condition was reasonably related to future criminality because it "enables peace officers to review P.O.'s electronic activity for indications that P.O. has drugs or is otherwise engaged in activity in violation of his probation." (*Id.* at p. 295.)

[2] The California Supreme Court has granted review in a third case that followed the reasoning in *J.B.* and *Erica R.* (*In re Mark C.* (2016) 244 Cal.App.4th 520, 535, rev. granted Apr. 13, 2016, S232849.)

Here, the electronic search conditions' effectiveness as it relates to future criminality is to monitor T.M.'s activity and communications associated with weapons possession and theft crimes through the use of his electronic devices and social media. We find that the social media search condition is reasonably related to future criminality and the court did not abuse its discretion in imposing it.

Overbreadth

In addition to his argument that the electronic search condition was unreasonable, T.M. also asserts that it is unconstitutionally overbroad because it unlawfully infringes on his right to privacy.

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K*. (2007) 40 Cal.4th 875, 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights . . . ." (*In re E.O*. (2010) 188 Cal.App.4th 1149, 1153.) We review de novo the constitutional challenge to the probation conditions. (*In re Shaun R*. (2010) 188 Cal.App.4th 1129, 1143.)

In *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, this court rejected an argument similar to T.M.'s regarding privacy, and determined that the "[d]efendant's constitutional privacy rights are not improperly abridged by the password conditions any more than they are by the search condition." (*Id*. at p. 1176.) We note that in *Ebertowski*, the defendant used electronic devices and social media to promote his gang activity. This court found that the probation department needed to monitor the defendant's gang communications and that the conditions did not unreasonably infringe on the defendant's privacy rights any more than a standard search condition. (*Id*. at p. 1175.)

Here, the electronic search condition is tailored to achieve the probation department's interest in deterring T.M.'s proclivity to photograph himself possessing weapons. Specifically, the condition limits searches to "social media website such as Mocospace, Facebook, Snapchat, Tinder, Twitter, or any other social media site in which the minor may receive, send or store photos or text messages relating to firearms." The condition is tailored to reveal T.M.'s personal communications regarding weapons, and does not allow all-encompassing searches of T.M.'s social media accounts. As such, the condition is sufficiently limited so as not to unlawfully infringe on defendant's right to privacy.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Grover, J.